INTERIOR BOARD OF INDIAN APPEALS

Kenneth F. Abbott v. Billings Area Director, Bureau of Indian Affairs

20 IBIA 268 (09/24/1991)

Related Board case:
21 IBIA 137

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

KENNETH F. ABBOTT
v.
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-107-A Decided September 24, 1991

Appeal from approval of an oil and gas communitization agreement.

Reversed and remanded.

1. Bureau of Indian Affairs: Generally--Indians: Leases and Permits: Generally

   The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are in accord with governing regulations.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Communitization Agreements

   Where the Bureau of Indian Affairs has approved an oil and gas lease which provides that the lease may not be included in a communitization agreement without the Indian landowner's consent, an Area Director may not approve a communitization agreement which includes the lease unless the landowner consents.

APPEARANCES: Harold G. Stanton, Esq., Hardin, Montana, for appellant; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for appellee; Harry R. Sachse, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kenneth F. Abbott seeks review of a May 17, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), approving a communitization agreement (CA) which included appellant's oil and gas lease. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him for further proceedings.

Background

Appellant owns an undivided 1/8 trust interest in Allotment No. 2322 on the Fort Peck Indian Reservation, covering the W½, sec. 11, T. 29 N.,

R. 48 E., Principal meridian, Roosevelt County, Montana, containing 320 acres more or less. The remaining 7/8 interests in this allotment are owned in fee by non-Indians. On December 1, 1984, appellant executed Oil and Gas Lease No. 14-20-0256-6837, authorizing Columbia Gas Development Corporation "to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under" the tract. The lease term was 5 years "from and after the approval hereof by the Secretary of the Interior, and as long as there is production in paying quantities." The royalty rate was 25 percent. The lease was approved by the Superintendent, Fort Peck Agency, BIA, on March 27, 1985.

Paragraph 11 of the lease provided: "UNIT OPERATION - No agreement for the cooperative or unit development for the field or area, affecting the leased lands, or any pool thereof, shall be valid without the advance consent of the lessor, or its duly authorized representative and the approval of the Secretary of the Interior."

The Assiniboine and Sioux Tribes of the Fort Peck Reservation (Tribes) own oil and gas rights in the SE¼ of sec. 11, which they have leased to Oryx Energy Company (Oryx). 1/ Oryx is also lessee of the 7/8 fee interests in the W½ of sec. 11.

On October 27, 1988, Oryx sought permission from the Montana State Office, Bureau of Land Management (BLM), to drill a well in the E½ SW¼ of sec. 11, in a location which required an exception to a rule of the Montana Oil and Gas Conservation Board because it was closer than allowed to a quarter section line. Oryx notified appellant of its application. The Tribes were also notified; they responded by letter of November 7, 1988, noting that their lease with Oryx was then pending approval and recommending that BLM

> 1) Allow the exception and [Oryx] be required to submit a Communitization Agreement to the Tribes for the E 1/2 SW 1/4 and W 1/2 SE 1/4 Section 11, after they complete the lease documents for the SE 1/4, or 2) Allow the exception location and if the well is a producing well then require [Oryx] to drill an offset on the SE 1/4 or pay compensatory royalties, or 3) Deny the exception location and require that a well be drilled at least 660 feet from the Tribal tract.

By decision dated November 22, 1988, BLM approved Oryx's application, stating:

1/ Oryx was known as Sun Exploration and Production Company and/or Sun Operating Limited Partnership during part of the period relevant to this appeal. For the sake of consistency, it will be referred to as Oryx throughout this opinion.

The tribal lease, Oil and Gas Lease No. 14-20-0256-7665, is not included in the administrative record.

> The exception location requested was based on seismic information which indicated that a small Nisku structure exists in the E½ SW¼ and W½ SE¼ of sec. 11. [Oryx's] representatives testified that a well located at a legal location in the SW¼ of sec. 11 would have a decreased probability of encountering recoverable reserves, and would not be in the interest of conservation. [Oryx] further testified that the proposed exception location request would protect correlative rights by stating that, if the expected Nisku reservoir is encountered, [Oryx] will request that a 160-acre spacing unit be established consisting of the E½ SW¼ and the W½ SE¼ of sec. 11.

(Nov. 22, 1988, BLM Decision at 1).

The approved well, known as the Stensland No. 1 Well, was completed on April 20, 1989, and began producing shortly thereafter. On May 15, 1989, Oryx applied for designation of a 160-acre drilling and spacing unit covering the E½ SW¼ and the W½, SE¼ of sec. 11 and for designation of the Stensland No. 1 Well as the permitted well for the unit. BLM approved the application on June 30, 1989. 2/

Oryx then began attempting to obtain the necessary approvals for a CA covering the area included in the spacing unit. On October 23, 1989, Oryx wrote to the Realty Specialist, Fort Peck Agency, seeking assistance in obtaining appellant's signature.

By memorandum of November 30, 1989, the Minerals Management Service (MMS) advised the Area Director that (1) it did not believe appellant would sign the CA; (2) payment of royalties to appellant had been delayed because of reporting errors made by Oryx, resulting in part from Oryx's attempt to report half of the royalties to the tribal lease, as if the CA had been approved; and (3) MMS policy was that payors must report all royalties to the producing lease unless a CA or unit agreement has been approved.

On January 9, 1990, the Tribes' attorney wrote to Oryx, alleging that Oryx was in default under its lease with the Tribes for failing to protect the leased lands from drainage, for producing the well causing the drainage, and for failing to obtain a CA. The attorney also wrote to BLM, requesting assistance in getting the matter resolved.

In a January 11, 1990, memorandum to the Area Director, BLM recommended that BIA approve the CA. The memorandum continued:

> In lieu of a CA, the lessee(s) of record on the Indian leases would be subject to payment of compensatory royalty

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2/ Apparently, Oryx's applications for an exception location and for a spacing unit were also approved by the Montana State Board of Oil and Gas Conservation. No record of the State proceedings is included in the record for this appeal.

> assessments. Compensatory royalty will be assessed in the amount of the royalty for each lease times the ratio of the acreage of the lease within the spacing unit to the total acreage within the spacing unit times the total value of the production from the spacing unit well, on a monthly basis effective the first of the month during which production was established. Oryx would be required to make whatever appropriate payments are needed to the fee tracts parties, and MMS would bill the Indian leases as previously discussed. All parties would then receive their share of the production from the Stensland No. 1 well.

(Jan. 11, 1990, BLM Memorandum at 2-3). BLM also notified Oryx that, unless a CA was submitted for approval, compensatory royalties would be assessed. On January 18, 1990, Oryx submitted a CA, signed by all parties except appellant and the Tribes. The Tribes signed the CA on January 26, 1990.

By order dated January 29, 1990, MMS directed Oryx to adjust its reporting and pay appellant additional royalties. Under the order, Oryx was required to pay appellant 25 percent royalties on one-eighth of the sales from the Stensland No. 1 Well.

On February 12, 1990, the Area Director wrote to the Tribes, stating that approval of the CA without appellant's consent was "not a valid option, since the lease form requires lessor consent to communitize and we are unable to cite an authority that would allow us to sign on behalf of a non-consenting lessor" (Area Director's Feb. 12, 1990, Letter at 2). He stated that the options for addressing the matter were (1) payment of compensatory royalties, (2) drilling an offset well on the tribal tract, and (3) approving a CA including all interests except appellant's. He requested that the Tribes indicate their preference. The Tribes responded on March 21, 1990, stating that they would agree to a CA including all parties except appellant if Oryx agreed to pay the Tribes a royalty of 25 percent on one-half the production from the well. If Oryx was unwilling to do this, they continued, compensatory royalties should be assessed.

On March 24, 1990, the Superintendent placed a hold on appellant's Individual Indian Money (IIM) account, stating that the hold would remain in effect until a CA was approved.

On March 28, 1990, the Area Director wrote to appellant, urging him to sign the CA. The Area Director stated:

> By letter of January 9, 1990, Mr. Harry R. Sachse, tribes' counsel, recommended to the BLM that the Bureau of Indian Affairs be urged to sign the communitization agreement on behalf of the allottee. We believe that this is not a valid option, since the lease form requires lessor consent to communitize, and we are unable to cite an authority that would allow us to sign on behalf of a non-consenting lessor.

> We believe that there are two options available to us in an effort to finalize an equitable distribution of royalty income.
>
> 1. Approve the communitization agreement for all interests except your undivided 1/8 allotted interest. The tribal and fee leases would then be communitized, allowing royalty income distribution to the tribes through MMS. We would then order Oryx to establish an escrow account for the 1/8 of 50 percent interest in the communitization for your interest. No income would be distributed to you until a signed agreement is executed between you and Oryx to determine what amount of income distribution would be established. Any amount above a total 1/8 of 50 percent interest is negotiable between you and Oryx.
>
> 2. Request BLM to determine and assess compensatory royalties. This would probably result in a distribution of income to the area which is being drained by the Stensland No. 1 Well, which would be as though a communitization agreement were in place. You would receive 1/8 of 50 percent of the income generated by the producing well.

(Area Director's Mar. 28, 1990, Letter at 2).

On April 6, 1990, appellant appealed the Superintendent's placement of a hold on his IIM account. In the same letter, he responded to the Area Director's March 28 letter, stating that he did not object to the assessment of compensatory royalties as long as he was paid according to the terms of his lease.

On May 17, 1990, the Area Director issued the decision on appeal here. He reversed the Superintendent's March 24 decision and ordered that all funds accrued in appellant's IIM account be released to him. However, he also informed appellant that he had approved the CA, including appellant's lease. He continued:

> The Secretary of the Interior has authority to pool your interest into the communitization agreement by approval of the agreement. Lease Provision No. 11, Unit operation, is of no force and effect.
>
> The well was drilled in an excepted location, and you did not object to the well's location; communitization was the expected method of development of the Stensland-Allotted No. 1 well. It is our position that communitization of a properly placed well is in the best interests of all affected trust parties, including your undivided 1/8 trust interest in Lease No. -6837. Communitization allows the orderly development of minerals and an equitable method of royalty determination and distribution. Communitization Agreement No. -CA46 will now control the distribution of royalties. Although Provision No. 11 (of appellant's lease) provides that signature of all affected parties will be required, it was

> never the intent of the Bureau of Indian Affairs (BIA) a nonconsenting party could circumvent the authority of the Area Director by creating a situation in which there was not an equitable distribution of the royalties.
>
> In other words, it was never intended you would receive more royalties than the amount determined through Spacing Order No. 1-90 Federal. The lease provision is in direct conflict with the authority of the Area Director and, in essence, provides you with more interest in the oil and gas than you actually have. As a result, it is our position this provision carries no force or effect, and is contrary to the Area Director's delegated authority to consider communitization agreements for approval as outlined under 25 Code of Federal Regulations (CFR).

(Area Director's Decision at 1-2).

Appellant's appeal from this decision was received by the Board on June 12, 1990. Appellant, the Area Director, and the Tribes filed briefs.

Discussion and Conclusions

The issue in this appeal is clear-cut: May BIA override a lease provision, which requires the consent of the Indian lessor to the inclusion of his property in a CA, if BIA determines that the CA is in the best interests of the lessor and/or other Indian lessors?

The Area Director and the Tribes contend that the authority to override this lease provision is encompassed within BIA's discretionary authority to approve CAs. The Area Director argues that his decision to approve the CA was made in appellant's best interests and that, under Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982), BIA has broad discretion to consider the Indian landowners' economic interests when deciding whether or not to approve a CA. The Area Director further contends that (1) the Superintendent lacked authority to sign the lease with the consent requirement included and (2) the Board lacks jurisdiction to substitute its judgment for BIA's in this case because the Area Director's decision was based on the exercise of discretion.

Addressing first the Area Director's contention regarding the Board's jurisdiction over this appeal, the Board finds that it has jurisdiction to review the Area Director's decision insofar, at least, as it reached a legal conclusion. Cf. Baker v. Muskogee Area Director, 19 IBIA 164, 168-69, 98 I.D. 5, 7 (1991). The Area Director's conclusion that the consent provision of appellant's lease was "of no force and effect" is clearly a legal conclusion and, as such, is subject to review by the Board.

The Area Director argues that the Superintendent did not have authority to approve the consent provision in the lease because he did not have authority to approve CA's. The Area Director acknowledges that the Superintendent did have authority to approve oil and gas leases.

Under the Billings Area delegations of authority, Superintendents are not authorized to approve CA's. See Billings Area Addendum to 10 BIAM 3, Sec. 2.7(d)(vii). Accordingly, CA's must be approved by the Area Director. Because they lack authority to approve CA's, Superintendents in the Billings Area also lack authority to limit the Area Director's authority over CA's. In this case, however, the Superintendent did not purport to act on his own authority in this regard. Appellant's lease was prepared, executed, and approved on a Billings Area Office form bearing the designation "BAO-436a, Rev. 10/82," titled "Oil and Gas Mining Lease - Trust Land" and stating: "Authority - This Lease is Authorized Under Provisions of 25 CFR - Sections 211, 212, 216 and Others." 3/ By issuing a lease form which included a landowner consent requirement, to be used for oil and gas leases of allotted land, the Area Director limited his own authority concerning the approval of CA's covering allotted land. The Board concludes that the Superintendent was acting within his authority in approving a lease executed on the Area Office form.

The Tribes, like the Area Director, argue that approval of the CA served the interests of appellant as well as the Tribes. Further, the Tribes contend that the regulations in 25 CFR Part 212 take precedence over the consent provision of appellant's lease; that appellant agreed by Paragraph 3(G) 4/ of his lease that the regulations would take precedence; and that the Secretary is bound by his own regulations. The Tribes rely in particular on 25 CFR 212.24(c), which provides: "All leases issued pursuant to the regulations in this part shall be subject to a cooperative or unit development plan affecting the leased lands if and when required by the Secretary of the Interior." The Tribes contend that, "[u]nder this provision, a [CA] is entirely within the discretion of the Secretary. There are no qualifiers. Approval of the allottee is unnecessary" (Tribes' Brief at 8). 5/

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3/ 25 CFR Parts 211, 212, and 216 govern, respectively, leasing of tribal lands for mining; leasing of allotted lands for mining; and surface exploration, mining and reclamation of Indian lands.

4/ Paragraph 3(G) requires the lessee

"[t]o abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 CFR, Section 221; and applicable Tribal Ordinances and Regulations. PROVIDED: That no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."
(Emphasis in original.)

5/ The Tribes also observe that the regulatory provision concerning CA's on allotted land is in contrast to the corresponding provision of the regulations governing tribal lands, 25 CFR 211.21(b), which provides:

"All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected."

The Board agrees that the Secretary, and his delegate, the Area Director, are vested with discretion concerning the approval of CA's. That discretion is subject to limitation, however. Once the Secretary acts to limit his discretion, he is bound by his own limitations. See, e.g., Cotton Petroleum Corp. v. Department of the Interior, 870 F.2d 1515 (10th Cir. 1989) (The Assistant Secretary - Indian Affairs must follow his own guidelines for approval of CA's). Under 25 CFR 212.24(c), the Area Director would normally have the discretion to include a lease of allotted land in a CA without obtaining the consent of the landowners. In this case, however, the Area Director had earlier limited his discretion by authorizing the Superintendent to approve appellant's lease with a provision requiring appellant's consent to the inclusion of his lease in a CA. Not only is BIA bound by its own regulations, as the Tribes argue, it is also bound by the terms of a lease which it has approved, when there is no conflict between the lease and the regulations.

The situation here is distinguishable from that addressed in Yavapai Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), cited by the Tribes. In that case, a lease provision stating that the lease could be cancelled by the Secretary and/or the tribe was held not to grant the tribe authority to cancel the lease unilaterally, because of a regulatory provision requiring Secretarial involvement in lease cancellations. Holding that the regulations controlled, the court noted that a suspension of the regulations would have been required to give effect to the lease provision and that the Superintendent, who had approved the lease, lacked authority to suspend the regulations. 707 F.2d at 1076 n.5.

In this case, unlike in Yavapai-Prescott, there is no conflict between the lease and the regulations. Authority to require consent to a CA by an owner of allotted land was well within the Area Director's authority under the regulations. Authority to approve a lease of allotted land on a form issued by the Area Director was clearly within the Superintendent's authority. No suspension of the regulations was required here in order to give effect to the consent provision in appellant's lease.

[1, 2] The Board finds that the consent provision in appellant's lease was binding on the Area Director and that he therefore lacked the authority to include appellant's lease in the CA.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's May 17, 1990, decision is reversed, and this matter is remanded to him for

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fn. 5 (continued)

The Tribes identify several other regulatory and statutory provisions which, they argue, indicate that the Secretary is vested with greater discretion in the oil and gas leasing of allotted lands than he is where tribal lands are concerned.

further proceedings as required to ensure that the Tribes are adequately compensated for the drainage of their lease.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

6/ On Sept. 18, 1990, the Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development) announced a policy intended to prevent recurrence of a situation like the one in this case. The Deputy's memorandum states:

"Oil and gas leases approved in the last ten years may contain provisions that allow an allottee to veto the formation of a communitization agreement (CA). Without an approved CA, allotted leases can drain other Indian leases, both tribal and allotted.

"When the lease is silent on CA concurrence, the allottee's consent is not necessary. Under these conditions, we can assume that the Secretary of the Interior can act to protect the interests of all Indian mineral owners simultaneously.

"When provisions for concurrence are explicit, we have no other recourse than to advise the BLM not to approve the APD [Application for Permit to Drill] until the operator secures an approved CA. We are therefore informing you that BIA policy is to withhold our recommendation for APD approval until the allottee agrees to a communitization agreement."